Alliance Bank Malaysia Bhd v Sail bin Yalang

HIGH COURT (KOTA KINABALU) — CIVIL APPEAL NO K12–18 OF 2009
ABDUL RAHMAN SEBLI JC
12 OCTOBER 2009

Banking — Securities for advances — Guarantee — Liability of guarantor — Failure by lender to prove actual loss suffered as result of borrower's breach — Whether actual liability under guarantee ascertained — Whether nominal damages of RM10 awarded — Whether lender failed to prove that letter of guarantee properly executed by guarantor — Whether burden of proof on lender

Contract — Guarantee — Liability of guarantor — Whether lender failed to prove actual loss suffered as a result of borrower's breach — Whether actual liability under guarantee ascertained — Whether nominal damages of RM10 awarded

Contract — Guarantee — Validity — Whether lender failed to prove that letter of guarantee properly executed by guarantor — Whether burden of proof on lender

Evidence — Burden of proof — Forgery of signature — Difference between onus and burden of proof — Denial of execution of document — Parties bearing burden of proof — Evidence Act 1950 s 101

The appellant had provided Rich Zone Sdn Bhd ('Rich Zone') an overdraft facility in the sum of RM180,000 ('the first overdraft facility') secured by a letter of guarantee dated 24 December 1993 ('LG1'). Later the appellant provided a further overdraft facility in the sum of RM50,000 to Rich Zone ('the second overdraft facility') secured by a second letter of guarantee dated 7 February 1994 ('LG2'). The respondent was one of two guarantors to the two overdraft facilities. Rich Zone defaulted in servicing the overdraft facilities and the appellant filed the present action against both Rich Zone and the guarantors in the sessions court. Judgment in default was entered against Rich Zone and both guarantors for RM58,243.21. The respondent succeeded in setting aside the judgment entered against him. At the conclusion of the trial the learned trial judge found as follows: (i) that the respondent had signed LG1; and (ii) that the appellant failed to prove that the respondent executed LG2. Accordingly she found the respondent liable in

respect of LG1 but not on LG2. She awarded nominal damages of RM10 to the appellant as she found that the amount of loss suffered in respect of the first overdraft facility was not proved. The appellant appealed against the learned trial judge's finding in respect of the execution of LG2 and in respect of whether the loss in relation to LG1 had been proven. The appellant submitted that since judgment had been entered against Rich Zone in the sum of RM58,243.21, the appellant could rely on cl 19 of LG1 to prove that the loss suffered in relation to LG1 was also RM58,243.21.

Held, dismissing the appeal with costs:

(1) The learned trial judge found no evidence to support the appellant's pleaded case that the respondent executed LG2. There was no justification to interfere with such finding of fact (see para 7).

(2) Although the agreed issue to be tried was whether the signature appearing on LG2 was a forgery, this did not relieve the appellant of the burden of proving its assertion that the LG2 was executed by the respondent. The respondent's liability depended on the existence of the appellant's assertion that he executed LG2. Clearly therefore the burden of proof lay on the appellant by virtue of s 101 of the Evidence Act 1950 (see paras 14–15).

(3) It was not for the respondent to prove in the negative that he did not execute LG2. If no evidence were given on either side to prove execution of LG2 the appellant's claim would fail. It is only after the appellant had established by prima facie evidence that LG2 was executed by the respondent that the burden of proving forgery could arise. There was no merit in the appellant's contention that the learned trial judge erred in law in placing the burden of proof on the appellant to prove execution of LG2 (see paras 16–17).

(4) Although the two overdraft facilities were operated under one account and maintained by the same borrower, they involved two different amounts secured by two separate letters of guarantee ('LG'). The respondent would be liable for the sum claimed if he had been held liable under both LGs. But the respondent was only held liable under the first LG. Therefore his liability was limited to the debt in respect of the first overdraft facility and cannot be extended to the second overdraft facility (see para 22).

(5) In the absence of evidence to show how much the borrower owed under the first overdraft facility, the actual amount of loss suffered by the appellant could not be determined. To lump together the debts under both the facilities and ask the respondent to pay for the combined

amount was to expect the respondent to assume responsibility for both facilities when his liability was only for the first facility (see para 23).

(6) The appellant's reliance on cl 19 of LG1 was of no avail as it still did not answer the question of how much the borrower owed under the first overdraft facility. The sum of RM58,243.21 was the total debt owing under both the first and second overdraft facilities and not only the debt owing under the first overdraft facility (see para 32).

[Bahasa Malaysia summary

Perayu telah memberikan Rich Zone Sdn Bhd ('Rich Zone') suatu kemudahan overdraf sejumlah RM180,000 ('kemudahan overdraf pertama') yang dijamin oleh sepucuk surat gerenti bertarikh 24 Disember 1993 ('LG1'). Kemudian, perayu memberikan kemudahan overdraf selanjutnya sejumlah RM50,000 kepada Rich Zone ('kemudahan overdraf kedua') dijamin oleh surat gerenti kedua bertarikh 7 Februari 1994 ('LG2'). Responden merupakan salah seorang penjamin ke atas kedua-dua kemudahan overdraf tersebut. Rich Zone gagal membayar semula overdraf-overdraf yang diberikan dan perayu memfailkan tindakan ini terhadap Rich Zone dan penjamin-penjamin di mahkamah sesyen. Penghakiman ingkar dimasukkan terhadap Rich Zone dan kedua-dua penjamin tersebut bagi jumlah RM58,243.21. Responden berjaya mengetepikan penghakiman yang dimasukkan terhadapnya. Pada pengakhiran perbicaraan, hakim perbicaraan yang bijaksana memutuskan seperti berikut: (i) bahawa responden telah menandatangani LG1; dan (ii) bahawa perayu gagal membuktikan bahawa responden telah melaksanakan LG2. Maka, beliau memutuskan bahawa responden bertanggungan berikutan dengan LG1 tetapi bukan terhadap LG2. Beliau mengawardkan ganti rugi nominal sebanyak RM10 kepada perayu kerana beliau mendapati bahawa jumlah kerugian yang dialami berkaitan dengan kemudahan overdraf tidak dibuktikan. Perayu merayu terhadap keputusan hakim yang bijaksana berkaitan dengan pelaksanaan LG2 dan juga sama ada kerugian berkaitan dengan LG1 telah dibuktikan. Perayu menghujah bahawa memandangkan penghakiman telah dimasukkan terhadap Rich Zone bagi jumlah RM58,243.21, perayu boleh menggunapakai klausa 19 LG1 bagi membuktikan kerugian yang dialami berikutan dengan LG1 juga berjumlah RM58,243.21.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim yang bijaksana memutuskan bahawa tiada keterangan untuk

menyokong kes perayu bahawa responden telah melaksanakan LG2. Tiada justifikasi untuk campur tangan dengan penemuan fakta tersebut (lihat perenggan 7).

(2) Walaupun isu untuk dibicarakan yang telah dipersetujui ialah sama ada tandatangan pada LG2 adalah palsu, ini tidak melepaskan perayu untuk membuktikan penegasannya bahawa LG2 tersebut telah dilaksanakan oleh responden. Liabiliti responden bergantung kepada penegasan perayu bahawa dia yang melaksanakan LG2. Jelaslah bahawa beban pembuktian adalah pada perayu berikutan s 101 Akta Keterangan 1950 (lihat perenggan 14–15).

(3) Responden tidak perlu membuktikan bahawa dia telah melaksanakan LG2 tersebut. Jika tiada keterangan dikemukakan oleh mana-mana pihak untuk membuktikan pelaksanaan LG2 tersebut, tuntutan perayu akan gagal. Hanya jika perayu membuktikan dengan keterangan prima facie bahawa LG2 dilaksanakan oleh responden, maka beban membuktikan pemalsuan akan berbangkit. Tiada merit dalam hujahan perayu bahawa hakim perbicaraan yang bijaksana khilaf dari segi undang-undang apabila meletakkan beban pembuktian ke atas perayu bagi membuktikan pelaksanaan LG2 (lihat perenggan 16–17).

(4) Walaupun kedua-dua kemudahan overdraf diberikan dalam satu akaun yang dipunyai oleh peminjam yang sama, kemudahan tersebut terdiri daripada dua jumlah yang berbeza dijamin oleh dua surat gerenti yang berbeza ('LG'). Responden akan bertanggungan ke atas jumlah yang dituntut jika dia didapati bertanggungan terhadap kedua-dua LG tersebut. Tetapi responden hanya didapati bertanggungan di bawah LG yang pertama. Oleh itu, liabilitinya terhad kepada hutang berkaitan dengan kemudahan overdraf pertama dan tidak boleh mengjangkau kepada kemudahan overdraf kedua (lihat perenggan 22).

(5) Dalam ketiadaan keterangan menunjukkan berapa banyak peminjam berhutang di bawah kemudahan overdraf pertama, jumlah kerugian sebenar yang dialami oleh perayu tidak boleh ditentukan. Mencampurkan kesemua hutang di bawah kedua-dua kemudahan tersebut dan meminta responden membayar jumlah yang telah dikumpulkan tersebut adalah seperti mengharapkan responden menanggung beban bagi kedua-dua kemudahan sedangkan liabilitinya hanyalah kepada kemudahan yang pertama (lihat perenggan 23).

(6) Kebergantungan perayu terhadap klausa 19 LG1 adalah sia-sia kerana masih belum menjawab berapakah jumlah hutang peminjam di bawah kemudahan overdraf pertama. Jumlah RM58,243.21 merupakan total hutang di bawah kedua-dua kemudahan overdraf tersebut dan bukannya hanya jumlah hutang di bawah kemudahan overdraf pertama (lihat perenggan 32).]

Notes

For cases on forgery of signature, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 462–467.
For cases on guarantee, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2139–2184.
For cases on liability of guarantor, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3986–3993.
For cases on validity, see 3(1) *Malllal's Digest* (4th Ed, 2006 Reissue) 4069–4077.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Haron v Macaulay [1969] 1 MLJ 169, FC (refd)
Lionel Edwards Ltd v State of West Bengal AIR 1967 Cal 191 (refd)
Orix Credit Malaysia Sdn Bhd v M/S Belquip Sdn Bhd & Ors [2007] 3 MLJ 478; [2007] 9 CLJ 15, HC (refd)
Watt or Thomas v Thomas [1947] AC 484, HL (refd)

Legislation referred to

Evidence Act 1872 [IND] s 102
Evidence Act 1950 ss 58(1), 101, 102, 103

Saiful Azian bin Mokhtar (Jayasuriya Kah & Co) for the appellant.
Saban Sawayan (Saban Sawayan & Co) for the respondent.

Abdul Rahman Sebli JC:

THE FACTS

[1] The facts giving rise to this appeal can be summarised as follows. By letter of offer dated 22 December 1993, Sabah Bank Bhd offered to the borrower, Rich Zone Sdn Bhd ('Rich Zone') an overdraft facility in the sum of RM180,000 ('the first overdraft facility'). The first overdraft facility was secured by a letter of guarantee dated 24 December 1993. By a subsequent letter of offer dated 4 February 1994, Sabah Bank Bhd offered a further overdraft facility in the sum of RM50,000 to Rich Zone ('the second overdraft facility'). The second overdraft facility was secured by a second letter of guarantee dated 7 February 1994. The respondent was one of two guarantors to the two overdraft facilities.

[2] The appellant became the successor in title to Sabah Bank Bhd pursuant to a vesting order dated 21 November 2000. When Rich Zone defaulted in servicing the overdraft facilities, the appellant filed the present

A action against both Rich Zone and the guarantors in the Sessions Court at Kota Kinabalu. On 24 July 2004 judgment in default was entered against Rich Zone and both guarantors in the sum of RM58,243.21 together with agreed interest at the rate of 9.9%pa from 1 May 2002 to the date of full payment. The respondent succeeded in setting aside the judgment entered B against him on 26 September 2008 but the judgment against the borrower Rich Zone remains.

[3] At the commencement of the trial the agreed issues to be tried were as C follows:

(a) Whether the signature of the respondent appearing in the letter of guarantee dated 24 December 1993 was a forgery.

(b) Whether the signature of the respondent appearing in the letter of D guarantee dated 7 February 1994 was a forgery.

(c) If the signatures of the respondent as appearing in both letters of guarantee are not forgeries, whether the respondent is liable for the debt of Rich Zone.

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[4] At the conclusion of the trial the learned trial judge found issue (a) in favour of the appellant. She was satisfied that the respondent did sign the first letter of guarantee. However on issue (b) she found that the appellant failed to prove that the respondent executed the second letter of guarantee. F Accordingly she found the respondent liable in respect of the first letter of guarantee but not on the second letter of guarantee. She awarded nominal damages of RM10 to the appellant as she found that the amount of loss suffered in respect of the first overdraft facility (in relation to which the respondent was held liable under the first letter of guarantee) was not proved. G The RM10 was merely to serve as a peg on which to hang costs.

[5] The appellant's appeal is against the learned trial judge's finding in respect of issue (b) and her finding that the amount of loss had not been H proved. The appellant's grounds of appeal against the learned trial judge's finding on issue (b) are in paras 1 and 2 of the petition of appeal. They are as follows:

(1) The learned sessions court judge erred in law and in fact in holding that I the appellants have failed to prove on the balance of probabilities that the letter of guarantee dated 7 February 1994 was executed by the respondent/third defendant herein.

(2) In arriving at the said conclusion, the learned sessions court judge erred in law and in fact by failing to review all available evidence in particular

the unchallenged testimony of PW1 (Jeffrey Chu Wee Ming) as well as the surrounding circumstances of the case.

[6] Clearly these grounds are against the finding of fact made by the learned trial judge. The principles on appellate interference with findings of fact by the trial court are well established. The appellate court will only interfere if the findings are perverse or that the trial court had misappreciated the evidence or had acted on wrong principles. In the House of Lords decision in *Watt or Thomas v Thomas* [1947] AC 484 Viscount Simon said:

> ... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight.

[7] In the present case the learned trial judge found no evidence to support the appellant's pleaded case that the respondent executed the second letter of guarantee. On the evidence before her or rather the lack of it I find no justification to interfere with such finding of fact. The execution of the second letter of guarantee was purportedly witnessed by one Francis CK Liong but he could not be found and so was not called as a witness. In the absence of Francis CK Liong the appellant called Jeffry Chu Wee Ming (PW1) to prove that the second letter of guarantee was signed by the respondent in the presence of Fancis CK Liong. According to PW1 the signature of the witness appearing on the second letter of guarantee is the signature of Francis CK Liong. He said he is acquainted with the signature of Francis CK Liong as they were partners for more than 13 years.

[8] In my view evidence that the witness' signature on the second letter of guarantee belongs to Francis CK Liong is neither here nor there. It is certainly not proof that the respondent executed the second letter of guarantee and in the presence of Francis CK Liong. The evidence of PW1 proves nothing beyond the fact that the signature of the witness belongs to Francis CK Liong.

BURDEN OF PROOF

[9] In her deliberation on issue (b) the learned trial judge held the view that since the appellant failed to prove that the respondent executed the second

letter of guarantee the question of the respondent proving forgery of his signature did not arise. Learned counsel for the appellant submitted that in so deciding the learned trial judge had fallen into error on the burden of proof.

[10] Counsel's contention is that since the respondent alleged that his signature on the second letter of guarantee was forged, the burden was on him to prove the allegation and not for the appellant to prove that the respondent executed the second letter of guarantee.

[11] Learned counsel drew the court's attention to s 103 of the Evidence Act 1950 ('the Act') to support of his contention. This provision deals with proof of a particular fact and provides as follows:

> 103 Burden of proof as to particular fact
>
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person.

[12] What learned counsel's submission amounts to is this. Since the respondent bears the burden of proving forgery, the appellant is relieved of the burden of proving execution of the second letter of guarantee. With due respect to learned counsel he is reversing the onus of proof — instead of the appellant proving execution of the second letter of guarantee it is for the respondent to prove that he did not execute it. If learned counsel is right, all that the appellant needs to do to establish liability is to produce the second letter of guarantee without proving who executed it, then fold its arms and watch as the respondent discharges his burden of proof. That cannot be a correct proposition of law. The burden being on the respondent to prove forgery merely means that the appellant has no duty to prove that there was no forgery. It cannot be extended to mean that the appellant is relieved of the duty of proving all facts necessary to establish the respondent's liability.

[13] Since it is the appellant who desires the court to give judgment on the respondent's liability under the second letter of guarantee it is incumbent on the appellant to prove that the second letter of guarantee was executed by the respondent. The question of proving forgery does not arise in the absence of such evidence and in the absence of any admission by the respondent that the second letter of guarantee was executed by him. It makes no difference that the respondent did not plead *non est factum.*

[14] It is true, as pointed out by learned counsel, that the agreed issue to be tried was whether the signature appearing on the second letter of guarantee was a forgery but in my view this does not relieve the appellant of the burden

of proving its assertion that the second letter of guarantee was executed by the respondent. In fact the appellant sought to establish this fact by calling PW1 to prove that the second letter of guarantee was executed by the respondent. The appellant cannot now say that it has no duty to prove that fact merely because the learned trial judge did not find in its favour.

[15] There can be no dispute that the respondent's liability depends on the existence of the appellant's assertion that he executed the second letter of guarantee. Clearly therefore the burden of proof lies on the appellant by virtue of s 101 of the Act which provides:

> 101 Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[16] It is not for the respondent to prove in the negative that he did not execute the second letter of guarantee. If no evidence were given on either side to prove execution of the second letter of guarantee the appellant's claim would fail. See s 102 of the Act. It is only after the appellant has established by prima facie evidence that the second letter of guarantee was executed by the respondent that the burden of proving forgery could arise. In their commentary on the principle and scope of s 102 of the Indian Evidence Act 1872 which is in pari materia with s 102 of the Act the learned authors of *Sarkar on Evidence* (15th Ed) have this to say at p 1451:

> Section 102 makes it clear that the initial onus is always on the plaintiff and if he discharges that *onus* and makes out a case which entitles him to relief, the *onus* shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same (*Basiruddin v Sahebulla* 32 CWN 160).

[17] There is therefore no merit in the appellant's contention that the learned trial judge erred in law in placing the burden of proof on the appellant to prove execution of the second letter of guarantee.

[18] It was then argued by learned counsel that even if the burden of proof lies on the appellant, the burden has been discharged having regard to the following surrounding circumstances which learned counsel says supports the appellant's contention that the respondent did sign the second letter of

guarantee and that the allegation of fraud is inconsistent with the contemporaneous documents:

(a) The respondent did sign the first letter of guarantee.

(b) The respondent did not protest when issued with the letter of demand and did not make any payment after the demand.

(c) The respondent was the director of the borrower, Rich Zone and would sign documents which his employer Datuk Lim Chor Hen asked him to sign.

(d) The respondent was also sued in another case which tends to show that it was very likely that he might have stood as guarantor for the same borrower, Rich Zone on other occasions.

[19] On this issue I need only say that the points raised are speculative and fall short of discharging the legal burden of proof which lies on the appellant. It is true that the learned trial judge found the respondent to be an evasive, difficult and untruthful witness but that was in the context of the respondent's evidence in relation to the first letter of guarantee, which the learned trial judge ultimately found in favour of the appellant.

WHETHER QUANTUM OF LOSS PROVED

[20] Since the appellant only succeeded in proving liability in respect of the first letter of guarantee and not the second, the question is whether the amount of loss suffered in respect of the first overdraft facility has been proved. The learned trial judge found that there is no evidence to show the actual amount owed under the first letter of guarantee in respect of which the respondent was liable. She therefore found that the loss suffered was not proved.

[21] The appellant relied on the testimony of Teresa Manjaji (PW2), the Group special assets manager of the appellant bank to prove the loss suffered. Her evidence is that the two overdraft facilities totalling RM230,000 were combined and operated under one current account maintained by the same borrower, ie Rich Zone. However PW2 did not say how much was owed under the first facility and how much under the second facility. She merely said that the sum of RM58,243.21 claimed by the appellant is the amount due and owing under both overdraft facilities. The learned trial judge dealt with the issue in this manner:

> As I said, there is no evidence of how much that is. The plaintiff had quite ingeniously argued that since the liability of the third defendant up to the first RM180,000 is covered by the first letter of guarantee, the third defendant's liability under this summons is under the first letter of guarantee only because the amount

claimed by the plaintiff is less than RM180,000. In my judgment, such argument has no force to it in the face of the categorical sworn evidence of PW2 in court. She stated in no uncertain terms that the sum of RM58,243.21 as at April 2002 (the claim in the present action) was the amount due and owing under both overdraft facilities. She reinforced that stance when she stated that the demand issued by the bank's solicitors vide the letter of 16 May 2002 was for the amount due and owing under both overdraft facilities. The plaintiff cannot run away from the evidence and it is that the RM58,243.21 that is claimed by the plaintiff is the amount due on both overdraft facilities. Since there is no evidence as to what exactly is the amount outstanding and owing under the first draft facility, I found and held that the plaintiff had failed to prove the quantum of indebtedness under the first letter of guarantee.

[22] I find nothing wrong with the learned trial judge's reasoning as reproduced above. On the contrary I think she is clearly right. The two overdraft facilities may be operated under one account and maintained by the same borrower but they involved two different amounts secured by two separate letters of guarantee and executed on two different dates. The respondent would be liable for the sum claimed if he had been held liable under both letters of guarantee. But here the respondent was only held liable under the first letter of guarantee. Therefore his liability is limited to the debt in respect of the first overdraft facility and cannot be extended to the second overdraft facility.

[23] In the absence of evidence to show how much the borrower owed under the first overdraft facility, how is the court to determine the actual amount of loss suffered by the appellant? To lump together the debts under the first and second facilities and ask the respondent to pay for the combined amount would be to expect the respondent to assume responsibility for both facilities when his liability is only in respect of the first facility. That cannot be what the respondent bargained for when he executed the first letter of guarantee.

THE CERTIFICATE OF INDEBTEDNESS

[24] It was next contended by learned counsel for the appellant that since judgment had been entered against the borrower in the sum of RM58,243.21, the appellant could rely on cl 19 of the first letter of guarantee to prove that the loss suffered was in the sum of RM58,243.21. Clause 19 of the first letter of guarantee is couched in the following terms:

> any judgment recovered by the Bank against the customer in respect of such indebtedness shall be binding and conclusive against the surety's executor, administrators and legal representatives in all courts of law and elsewhere.

[25] In the Federal Court case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 Steve Shim CJ (Sabah and Sarawak) after referring to a passage in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 said this:

> The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[26] In applying *Cempaka Finance* Wong Dak Wah J in *Orix Credit Malaysia Sdn Bhd v M/S Belquip Sdn Bhd & Ors* [2007] 9 CLJ 15 said:

> There was no requirement on the part of the plaintiff to adduce evidence to prove quantum and the correctness of the amount claimed if the judgment in default against the first defendant was produced.

[27] In the instant case the learned trial judge declined to give effect to cl 19 of the first letter of guarantee on the ground that the judgment in default entered against Rich Zone was not produced at the trial. The other reason is that the issue concerning cl 19 was neither pleaded nor canvassed at the trial.

[28] I must with respect disagree with the learned trial judge on this point. Although the judgment entered against Rich Zone was not produced at the trial it was not disputed by the respondent and this is evidenced by para 12 of the agreed facts which reads:

> Judgment was entered against the first, second and third defendants on 24th July 2004 in the sum of RM58,243.21 together with agreed interest at the rate of 9.9% pa from 1 May 2002 to the date of full payment.

[29] A fact that is agreed need not be proved: see s 58(1) of the Act which provides:

> 58 Facts admitted need not be proved
>
> (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

[30] In *Haron v Macaulay* [1969] 1 MLJ 169 the former Federal Court held that the appellant in that case was bound by the admissions made by counsel who represented him, and the question of quantum should be approached on the basis of those admissions. Although the decision in that case concerns an admission by counsel I am of the view that it applies equally well to a situation where the facts are agreed by the parties.

[31] In *Evidence, Practice and Procedure* (3rd Ed) (2003) the learned authors at p 536 referred to the case of *Lionel Edwards Ltd v State of West Bengal* AIR 1967 Cal 191 where AK Das said in relation to admitted documents:

> Documents are either proved by witnesses or marked on admissions. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross examination or otherwise ...

[32] Be that as it may I am of the view that the appellant's reliance on cl 19 of the first letter of guarantee is of no avail as it still does not answer the question of how much the borrower owed under the first overdraft facility. As alluded to earlier the appellant bank itself through PW2 admitted that the sum of RM58,243.21 claimed by the appellant in the present action (which is the judgment sum obtained against the borrower) is the total debt owing under both the first and second overdraft facilities and not only the debt owing under the first overdraft facility. That means the amount claimed includes the borrower's debt under the second overdraft facility in respect of which the respondent has not been held to be liable.

[33] As for the learned trial judge's refusal to entertain the appellant's argument on cl 19 of the first letter of guarantee on the ground that the matter was neither pleaded nor canvassed at the trial it must be noted that the first letter of guarantee was already before the court (agreed bundle) and was referred to by witnesses during the trial. The appellant was therefore entitled to submit on the terms and conditions of the first letter of guarantee and that includes cl 19.

CONCLUSION

[34] For reasons stated above it is clear to me that the learned trial judge had not erred in finding that the appellant failed to prove execution of the second letter of guarantee and also the amount of loss suffered by the

appellant in respect of the first overdraft facility. Neither has she erred on the burden of proof. In the circumstances the appeal was dismissed with costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum